SUPREME COURT, U. S.

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No. 239

# In the Supreme Court of the United States

OCTOBER TERM, 1958

JOSEPH N. ROMM, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes and rule involved | 2 |
| Statement | 4 |
| Argument | 6 |
| Conclusion | 8 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308 | 7 |
| *Commissioner* v. *Superior Yarn Mills*, 228 F. 2d 736 | 7 |
| *Drybrough* v. *Commissioner*, 238 F. 2d 735 | 7 |
| *Holland* v. *United States*, 348 U. S. 121 | 6 |
| *Peacy-Byrnes Lumber Co.* v. *Commissioner*, 86 F. 2d 234 | 7 |
| *Polizzi* v. *Commissioner*, 247 F. 2d 875 | 7 |
| *Stein, Estate of Esther M.* v. *Commissioner*, 25 T. C. 940 | 7 |
| *Stern Bros. & Co.* v. *Commissioner*, 16 T. C. 295 | 7 |
| Statutes: | |
| Internal Revenue Code of 1939, § 23(c), 26 U.S.C. (1952 ed.) 23(c) | 3, 6 |
| Internal Revenue Code of 1954, § 7482, 26 U.S.C. (Supp. V) 7482 | 2 |
| Miscellaneous: | |
| Rev. Rul. 57-332, 1957-2 Cum. Bull. 231 | 7 |
| Rules of Practice of the Tax Court of the United States, Rule 50 | 3, 4, 7 |

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### OPINIONS BELOW

The first opinion of the Tax Court is not officially reported. The first opinion of the court of appeals modifying and otherwise affirming the Tax Court is reported at 245 F. 2d 730. This Court denied certiorari, 355 U.S. 862. The order and decision of the Tax Court entered to carry out the mandate of the court of appeals are not officially reported (Pet. App. 5-6.). The opinion of the court of appeals affirming the order and decision of the Tax Court is not yet reported (Pet. App. 7-10).

## JURISDICTION

The judgment of the court of appeals was entered on May 16, 1958. The petition for a writ of certiorari was filed on July 31, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether on remand of a case to the Tax Court for modification of its decision the taxpayer may raise new issues unrelated to the modification.

2. Whether in computing taxable income by the net worth method the increase in net worth should be reduced by Federal income taxes and penalties becoming due in that year.

## STATUTES AND RULE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C., Supp. V):

> SEC. 7482. COURTS OF REVIEW.
>
> (a) *Jurisdiction.*—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * * * *

(c) *Powers.*—(1) *To affirm, modify, or reverse.*—Upon such review, such courts shall have power to affirm or, if the decisions of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

* * * *

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(c) *Taxes generally.*—

(1) *Allowances in general.*—Taxes paid or accrued within the taxable year, except—

(A) Federal income taxes;

* * * *

Rules of Practice of the Tax Court of the United States (Rev. January 1957):

Rule 50. *Computations by parties for entry of decision.* — (a) *Agreed computations.* — Where the Court has filed its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to the report of the Court, they or either

of them shall file promptly with the Court an original and 2 copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision.

* * * *

(c) *Limits on argument under this Rule.*—Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for retrial or reconsideration.

## STATEMENT

After the Tax Court announced its first opinion in this case (1956 P-H T. C. Mem. Dec. ¶ 56,104), the parties agreed upon a computation of the taxpayer's liability in conformity with the opinion. See Tax Court Rule 50, *supra*, pp. 3-4. The Tax Court entered its decision on the basis of the agreed computation. On petition for review, the court of appeals modified the decision in two minor respects, stating in its opinion (245 F.2d 730, 736):

> The case is remanded to the Tax Court for modification of the order as to interest on the deficiency and as to the liability of the taxpayer's wife. In all other respects, the decision is affirmed.

The judgment and mandate in turn provided (Pet. App. 1):

> It is now here ordered and adjudged by this Court that the decision of the said The Tax Court of the United States, in this cause, be, and the same is hereby, modified as set forth in the opinion of the Court filed herein and, as so modified, it is affirmed; and that this cause be, and the same is hereby, remanded to The Tax Court of the United States for further proceedings not inconsistent with the opinion of the Court filed herein. May 27, 1957.

The taxpayer's petition for certiorari was denied. 355 U. S. 862.

On remand, the Tax Court entered a new decision eliminating the wife's liability and recomputing the interest (Pet. App. 2-3). Petitioner did not question those items but filed an entirely new computation of his basic tax liability, asserting for the first time that his net income for each of the years in question should be reduced by the taxes and penalties held to have been due on the preceding year's income.[*] The Tax Court rejected the recomputation on the ground that it raised new issues and was not in accordance with the mandate of the court of appeals (Pet. App. 5-6). The court of appeals affirmed, noting in addition that the issue sought to be raised was "lacking in merit" (Pet. App. 7-10).

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[*] See the appendix to petitioner's brief in the court of appeals, pp. Ap. 5-Ap. 11.

## ARGUMENT

1. Since the court of appeals in fact disposed of petitioner's claim on the merits, he can hardly object to the primary holding that the claim was not timely raised. Indeed, petitioner's underlying claim is so patently frivolous that the question whether he can raise it seems quite academic.

In substance, petitioner seeks a deduction from his net income for Federal income taxes. Clearly no such deduction is allowable. Int. Rev. Code, 1939, § 23(c)(1)(A), *supra*, p. 3. Petitioner, accordingly, takes an indirect approach. He suggests that since the taxes and penalties for, say, 1945 were payable March 15, 1946, they were an outstanding liability on December 31, 1946, and therefore reduced his net worth as of that date. Since his income was reconstructed by the net worth method, the necessary result, he says, is to reduce his net income for the year. What petitioner overlooks is that any reduction of net worth (*e.g.*, because of amounts spent during the year on personal expenses) which is not attributable to a deductible expense must be added back to the increase in net worth to determine the true income for the year. *Holland* v. *United States*, 348 U.S. 121, 125. Thus the result is the same whether the taxes due are treated as not reducing net worth or are deducted from net worth with a compensating adjustment to income.

The cases cited by petitioner hold only that a corporation's "earnings and profits"—which determine whether distributions are taxable as dividends—are

reduced by taxes, penalties, and interest assessed. *Dysbrough* v. *Commissioner*, 238 F.2d 735 (C. A. 6); *Estate of Esther M. Stein* v. *Commissioner*, 25 T. C. 940; *Stern Bros. & Co.* v. *Commissioner*, 16 T. C. 295; Rev. Rul. 57-332, 1957-2 Cum. Bull. 231. They are obviously irrelevant here.

2. Petitioner's argument on the timeliness of his claim is no more substantial. The court of appeals did not remand the case for a rehearing. It expressly affirmed the decision except for two minor issues, as to which it remanded the case to permit the decision to be modified. The Tax Court was required to confine itself to those issues. *E.g.*, *Peace-Byrnes Lumber Co.* v. *Commissioner*, 86 F.2d 231 (C. A. 5). Indeed, the issue could not properly have been raised under the Rule 50 computation after the Tax Court's first opinion on the merits. Tax Court Rule 50(c); *Bankers Coal Co.* v. *Ewart*, 287 U. S. 308; *Commissioner* v. *Superior Yarn Mills*, 228 F.2d 736 (C. A. 4).

*Polizzi* v. *Commissioner*, 247 F.2d 875 (C. A. 6), is of no help to petitioner. There the court of appeals held, on an appeal from an initial decision of the Tax Court, that the Tax Court had abused its discretion in refusing to allow the taxpayer a further hearing on an issue of which he had not been fairly apprised until the Rule 50 computation. In this case, not only was there no justification for the failure to raise the issue in the original Tax Court pleadings, but the issue was not raised at all until after the decision had been affirmed by the court of appeals in all material respects and remanded for two minor modifications.

## CONCLUSION

The petition for a writ of certiorari should be denied.

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AUGUST 1958.